

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 17, 2008

STATE OF TENNESSEE v. MICHAEL DAVID VELAZQUEZ

**Direct Appeal from the Criminal Court for Knox County
Nos. 87679, 88508, 88509 Kenneth F. Irvine, Jr., Judge**

No. E2008-01137-CCA-R3-CD - Filed June 18, 2009

The appellant, Michael David Velazquez, pled guilty in the Knox County Criminal Court to felony driving under the influence, possession of less than .5 grams of cocaine with the intent to sell, evading arrest, and misdemeanor driving under the influence. The plea agreement provided that the appellant would receive a total effective sentence of seven years, with the trial court to determine the manner of service of the sentences. On appeal, the appellant challenges the trial court's denial of alternative sentencing. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Leslie M. Jeffress, Knoxville, Tennessee, for the appellant, Michael David Velazquez.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Jeff Blevins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On August 27, 2007, the Knox County Grand Jury returned presentment number 87679 which charged the appellant on count one with possession of .5 grams or more of cocaine with the intent to sell and on count two with possession of .5 grams or more of cocaine with the intent to deliver. On February 12, 2008, the Knox County Grand Jury returned indictment number 88508 which charged the appellant with multiple driving under the influence (DUI) offenses, simple possession of marijuana, violating the implied consent law, and driving on a revoked license. Also on that date, the grand jury returned presentment number 88509, which charged the appellant with

evading arrest, various DUI offenses, violating the implied consent law, driving on a revoked license, and failing to provide proper evidence of financial responsibility.

Thereafter, on April 2, 2008, the appellant pled guilty in case number 88508 to DUI, a Class E felony, in exchange for a sentence of one year. He also pled guilty in case number 87679 to the lesser-included offense of possession of less than .5 grams of cocaine with the intent to sell, a Class C felony, in exchange for a sentence of six years which was to be served consecutively to the one-year felony DUI sentence. Finally, the appellant pled guilty in case number 88509 to evading arrest, a Class A misdemeanor, and to DUI, also a Class A misdemeanor. Pursuant to the plea agreement, the appellant received a sentence of eleven months and twenty-nine days for each misdemeanor conviction to be served concurrently with the sentence in case number 88679 for a total effective sentence of seven years. The plea agreement further provided that the appellant would apply for alternative sentencing and that the trial court would determine the manner of service of the sentence. Additionally, the plea agreement provided that the remaining charges would be dismissed.

At the sentencing hearing, neither the appellant nor the State presented witnesses. The parties instead relied upon the appellant's presentence report. Defense counsel acknowledged that the presentence report reflected that the appellant had "a long history of violations and that they believe that he's a high risk." Defense counsel also acknowledged that the appellant had "been turned down by Enhanced Probation" and had failed a drug screen. Nevertheless, defense counsel argued that the appellant had started a new job, had served a significant amount of time in confinement prior to the hearing, and should be granted alternative sentencing.

The State argued that the appellant was a high risk to reoffend. As support for its argument, the State noted that the appellant had a lengthy criminal history consisting of numerous arrests and convictions beginning in 1993.

The trial court stated that the presentence report reflected that the appellant's work history in 2007 was limited. In fact, the appellant told the preparer of the report that he was employed about one and one-half months, and his other income was derived from selling drugs. The court noted that the appellant had two prior felony convictions and twenty-two misdemeanor convictions or juvenile court adjudications. The court acknowledged that the appellant had stated that he wanted to change. However, the court found that based upon his limited work history, the number of prior convictions, and his use of drugs while awaiting sentencing, the appellant was not an appropriate candidate for alternative sentencing. Therefore, the court ordered the appellant to serve his sentence in confinement. On appeal, the appellant challenges the trial court's ruling.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information

offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement by the appellant in his own behalf. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Generally, an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. Tenn. Code Ann. § 40-35-303(a) (2006). The appellant's sentences meet this criteria. Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5).

In the instant case, the appellant is a standard Range I offender convicted of a Class E felony and a Class C felony; therefore, he is considered to be a favorable candidate for alternative sentencing. The appellant argues that the trial court denied alternative sentencing "apparently in order to deter." The record does not indicate that the trial court denied alternative sentencing because of deterrence. Instead, the record reflects that the trial court denied alternative sentencing because of the appellant's long history of criminal conduct. The trial court was concerned about the appellant's tendency to reoffend, specifically evidenced by his testing positive for drugs while awaiting sentencing. Therefore, the court believed that the appellant was not an appropriate candidate for alternative sentencing.

Our review of the record reveals that the presentence report, which the appellant concedes is accurate, reflects that as an adult, the appellant amassed two prior felony convictions, aggravated

assault and reckless endangerment with a deadly weapon, and at least thirteen misdemeanor convictions. We, like the trial court, conclude that this is a significant criminal history. Moreover, we note that the presentence report indicates that the appellant received a suspended sentence for many of the misdemeanor convictions, yet he continued to reoffend. Further, as the trial court observed, the appellant admitted that he tested positive for drugs while awaiting sentencing. The appellant's repeated non-compliance with the law reflects poorly upon his rehabilitative potential. Accordingly, we conclude that the trial court did not err in denying alternative sentencing.

III. Conclusion

Based upon the foregoing, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE